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Nos. 81-2147, 81-2188

IN THE
Supreme Court of the United States
October Term, 1982

THE STATE OF ARIZONA, ET AL.,
Petitioners,
versus
SAN CARLOS APACHE TRIBE OF ARIZONA
AND THE NAVAJO TRIBE OF INDIANS, ET AL.,

THE STATE OF MONTANA, ET AL.,
Petitioners,
versus
NORTHERN CHEYENNE TRIBE OF THE NORTHERN
CHEYENNE INDIAN RESERVATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS IN NO. 81-2147

ROBERT K. CORBIN
The Attorney General
RUSSELL A. KOLSRUD
1275 West Washington
Phoenix, Arizona 85007
Assistant Attorney General
Tel. (602) 255-1640
Attorneys for Petitioners State of Arizona and Arizona State Land Department

BILL STEPHENS
STEPHENS AND TOLES
1010 East Jefferson
Phoenix, Arizona 85034
Tel. (602) 253-1010
Attorneys for Petitioners City of Phoenix and City of Prescott, Arizona

JON L. KYL (Counsel of Record)
M. BYRON LEWIS
JOHN B. WELDON JR.
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Tel. (602) 262-5814
Attorneys for Petitioners Salt River Valley Water Users' Association and Salt River Project Agricultural Improvement and Power District

ALVIN H. SHRAGO
EVANS, KITCHEL & JENCKES, P.C.
2600 N. Central Avenue
Phoenix, Arizona 85004
Tel. (602) 234-2600
Attorneys for Petitioners Phelps Dodge Corporation and Phelps Dodge Industries, Inc.

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I.
INTRODUCTION

The Arizona petitioners have only one objective in this litigation: to achieve a final, comprehensive, binding adjudication of water rights as to all water users in Arizona.

The Tribes' position would preclude the attainment of this objective by limiting the application of the McCarran Amendment to nondisclaimer states. The result would be to

"trivialize" the decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), by "relegat[ing] it to relative insignificance." *United States Brief* at 9, 12.

Furthermore, the United States and the Arizona Tribes contend that they cannot or should not be required to participate in general adjudications of water rights. They offer as an alternative admittedly piecemeal litigation in federal court. Their argument is fundamentally inconsistent with *Colorado River* and contrary to the position of the Montana Tribes, who "read *Colorado River* as requiring a unified, comprehensive adjudication of all rights on a stream in a single forum." *Brief for Assiniboine and Sioux Tribes, Confederated Salish and Kootenai Tribes and Northern Cheyenne Tribe* at 26 n. 33.

The government and the Tribes attempt to circumvent *Colorado River* by suggesting this Court should revise or reconsider that decision. That is unnecessary. Respondents have not shown the Arizona proceedings to be unfair. The federal district court's deferral to the Arizona proceedings should be affirmed by application of the same considerations of wise judicial administration that were applied in *Colorado River*.

II.

ARIZONA'S DISCLAIMERS DO NOT DEPRIVE ITS COURTS OF JURISDICTION UNDER THE McCARRAN AMENDMENT TO ADJUDICATE WATER RIGHTS CLAIMED BY THE UNITED STATES ON BEHALF OF INDIANS.

A. *The Disclaimers Do Not Create Jurisdictional Distinctions Between Disclaimer And Nondisclaimer States.*

The disclaimers found in the Enabling Acts and constitutions of eleven western states do not create two different sets of federal Indian law, one for states admitted prior to 1889 and another for those admitted later. The disclaimers merely acknowledged congressional control and authority

over Indians and Indian affairs. *See United States Brief* at 14; *Crow Brief* at 43; *Salt River Pima-Maricopa Indian Community Brief* at 25. As the government understands, "it is too late in the day" to impose a different set of laws on the western disclaimer states on the unsupported assumption that Congress "meant to treat them with special distrust in Indian matters." *United States Brief* at 14.

The United States and the Tribes attribute the disclaimer provisions to a reaction to this Court's decision in *United States v. McBratney*, 104 U.S. 621 (1882). Yet, the Tribes ignore that in *United States v. Draper*, 164 U.S. 240 (1896), this Court applied the same test for application of state law on an Indian reservation in Montana (one of the first disclaimer states) that it had earlier used in *McBratney* for Colorado, a nondisclaimer state. Thus, different jurisdictional rules should not now be imposed in disclaimer states when this Court refused to do so only seven years following enactment of the first disclaimer.

Nor have the Tribes adequately explained Congress' identical treatment, both before and after enactment of the McCarran Amendment, of disclaimer and nondisclaimer states in permitting application of state laws to Indian reservations.[1] For example, not a single Tribe even attempted to reconcile its view of the disclaimers' meaning with Congress' blanket extension of all states' workmen's compensation laws to federal lands and Indian reservations, without requiring repeal or modification of the disclaimers.

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[1] The single exception is Section 6 of Public Law 280 which "was placed in the Act to eliminate any *possible* organic law barriers to the assumption of jurisidiction by disclaimer States." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 495 (1979) (emphasis added). This Section was essentially an afterthought by Congress. *Id.* at 496. Moreover, the United States, as well as the Tribes, concede the Court of Appeals erred in remanding the Arizona and Montana cases to the district courts for determinations of whether the States "properly asserted jurisdiction pursuant to Public Law 280." 668 F.2d at 1098.

See 40 U.S.C. § 290.[2] Their attempted explanation that some of the other statutes condition application of state law to Indian reservations upon Secretarial or tribal approval ignores the very point—namely, that Congress has not required repeal or modification of the disclaimers as a condition to application of these state laws to Indian reservations.

Finally, the Tribes have not refuted the legislative history of the McCarran Amendment which confirms that both Congress and the Executive Branch understood that it would be universally applicable throughout the West. *See Petitioners Brief* in No. 81-2147 at 17-20. Their argument that the McCarran Amendment was not intended to encompass Indian water rights was answered in *Colorado River*. *See* 424 U.S. at 811-12. Their argument that Congress did not mention the disclaimers in adopting McCarran is no reason for the Court to now create such a distinction. Neither Congress nor this Court has ever treated the disclaimers as creating a line of demarcation between the western states, and for this Court to do so now would wreak havoc on those states' efforts to resolve "conflicting claims to this scarce resource. . . ." 424 U.S. at 804.

B. *The McCarran Amendment Is Compatible With Arizona's Disclaimer.*

The Tribes insist that the petitioners must show a repeal of the disclaimers by Congress and the states in order for McCarran to apply. That would be true only if the disclaimers and McCarran were inconsistent. They are not. Arizona's disclaimer is entirely compatible with Congress' grant of state court jurisdiction under McCarran. Enactment of the McCarran Amendment was an exercise of the

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[2] Moreover, the Ninth Circuit Court of Appeals recently held in *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982), that Section 290 made Arizona's workmen's compensation laws applicable to Indian claims arising on the Navajo reservation. *See also, Johnson v. Kerr-McGee Oil Industries, Inc.*, 129 Ariz. 393, 631 P.2d 548 (Ct.App.), appeal dismissed, 454 U.S. 1025 (1981).

acknowledged "absolute jurisdiction and control" of Congress over Indian lands, and thus, is entirely consistent with, not contrary to, the express wording of Arizona's disclaimer.

The Tribes' argument that even if enactment of McCarran did "remove" the Enabling Act's impediment to state court jurisdiction, the Arizona constitutional disclaimer stands as a separate and independent bar to state jurisdiction, ignores the fact that the wording of both disclaimers is identical. The congressional control exercised over Indian lands through enactment of McCarran is consistent with the language of both disclaimers and requires neither repeal nor amendment of either for McCarran to be effective in Arizona. There is no unresolved state constitutional issue.

Finally, the Tribes argue with this Court's holding in *Colorado River* that the general jurisdictional provisions of Public Law 280 do "not purport to limit the special consent to jurisdiction given by the McCarran Amendment." 424 U.S. at 812 n. 20. As this Court acknowledged in *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976), Section 4(b) of Public Law 280, which excludes water rights from its scope, evidences "a congressional intent merely to reaffirm the existing law whatever subsequent litigation might determine it to be." *Id.* at 391-92. *Colorado River* subsequently made that determination as to the adjudication of Indian water rights under the McCarran Amendment.

C. *Arizona's Disclaimer Does Not Confer Exclusive Jurisdiction In Federal Courts To Adjudicate Water Claims Held By The United States On Behalf of Indians.*

The disclaimers contain two distinctly different provisions relating to Indian lands. The first "disclaim[s] all right and title" to federal and Indian lands, and the second acknowledges that Indian lands "shall be and remain subject to ... the absolute jurisdiction and control of the

Congress. . . ." Neither deprives the Arizona state courts of subject matter jurisdiction, and neither confers exclusive jurisdiction on the federal courts, to adjudicate water claims held by the United States on behalf of Indians.

The Tribes do not dispute that the first clause, disclaiming all right and title, is, as this Court held in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), a disclaimer of only the states' proprietary interest. No Arizona Tribe has attempted to explain how adjudication of water rights could constitute the assertion of a proprietary interest.[3]

As to the second clause, the Tribes mischaracterize our argument by claiming that we applied the proprietary-governmental distinction to that clause. That is incorrect. Our position is that *Kake* held that the "absolute" federal jurisdiction acknowledged by the disclaimer "is not invariably exclusive jurisdiction." *Id.* at 68. Indeed, the Court reached its conclusion by relying on *Draper* (a Montana case) and *Williams* (an Arizona case).[4]

The Tribes' attempt to brush *Kake* aside as an "off-reservation" case ignores that this Court's decision in *Kake* was premised in large part on *Williams*, an "on-reservation" case. They also ignore the fact that Alaska's disclaimer provision was even broader than Arizona's, since it was applicable not only to Indian lands but also to "other property (including fishing rights)" held by any Indians. 369 U.S. at 64.

We have found no case in which this Court has barred the exercise of state jurisdiction on the basis of a disclaimer provision. The Tribes' citation of *McClanahan v. State Tax*

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[3] *See Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979); and see *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981).

[4] In reaching this conclusion, the Court expressly noted that "[t]he momentum of substantially identical past admission legislation touching Indians carried the settled meaning governing the jurisdiction of States over Indian property" to Alaska's disclaimer. *Id.* at 68.

Commission of Arizona, 411 U.S. 164 (1973), and other cases[5] for the contrary position is inaccurate. Justice Brennan, for a unanimous Court, explained in *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 377 (1976), that "*McClanahan* held that Arizona was disabled in the absence of congressional consent from [taxing reservation Indians]."[6] In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), decided the same day as *McClanahan*, Justice White recognized that *McClanahan* "lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." The test consistently applied by this Court looks to:

> ... two independent but related barriers to the assertion of state regulatory authority over *tribal reservations and members*. First, the exercise of such authority may be pre-empted by federal law.... Second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (emphasis added).

The Ninth Circuit's recognition that state court general adjudications do not interfere with tribal self-government[7] remains unchallenged by the Tribes. Indeed, it would be difficult for them to argue to the contrary in light of this Court's opinion in *Colorado River*. *See also, Kake*, 369 U.S. at 68-69; *Puyallup Tribe, Inc. v. Department of Game of the State of Washington*, 433 U.S. 165, 175-176 (1977); and *Montana v. United States*, 450 U.S.

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[5] For example, the results in *Williams v. Lee*, 358 U.S. 217 (1959), and *Fisher v. District Court*, 424 U.S. 382 (1976), were based upon infringement of tribal self-government. The result in *Williams v. United States*, 327 U.S. 711 (1946), was based upon interpretation of the Assimilative Crimes Act, 18 U.S.C. § 468. None of these cases was decided by application of any disclaimer provision.

[6] *McClanahan* and *Bryan* again confirm this Court's consistent treatment of disclaimer and nondisclaimer states.

[7] Pet. App. in No. 81-2147 at C-10.

544 (1981). Far from preempting adjudication of federal water rights in federal court, Congress has explicitly acknowledged through the McCarran Amendment the right of state courts to determine federal water claims, including those asserted on behalf of Indians. Thus, adjudication of Indian water claims in comprehensive state court proceedings pursuant to the McCarran Amendment is consistent with the dual policies reiterated in *Bracker*.

To limit the McCarran Amendment's application to the nondisclaimer states as now urged by the Tribes would not only revive the evils McCarran sought to eliminate, but would also "enervate the Amendment's objective." 424 U.S. at 811. That would turn this Court's holding in *Colorado River* into an academic exercise in the West.

III.

CONSIDERATIONS OF WISE JUDICIAL ADMINISTRATION COMPEL DISMISSAL OF THE REACTIVE LITIGATION IN THE ARIZONA FEDERAL COURT.

The Tribes contend that the federal courts should have exclusive jursidiction over Indian water claims, on the alternative grounds that 28 U.S.C. § 1362 sets forth a congressional mandate for federal court adjudication of In-

dian water rights[8] or that the inclusion of Indian water rights in the McCarran Amendment should be held operative only in the federal courts. Both of these arguments were expressly rejected in *Colorado River*, where this Court held that both state courts and federal courts have concurrent jurisdiction. 424 U.S. at 809.[9]

The clear and unmistakable teaching of *Colorado River* is that considerations of wise judicial administration should be examined to determine which of the two courts with concurrent jurisdiction should proceed. The most important of these considerations is the McCarran Amendment itself, which, as this Court expressly recognized in *Colorado River*, manifests two fundamental policies: the avoidance of piecemeal adjudication of water rights, and the recognition of

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[8] Section 1362 was enacted only to remove the $10,000 amount in controversy requirement under the general federal question provision of 28 U.S.C. § 1331. *Henningson, Durham & Richardson v. Gila River Indian Community*, 626 F.2d 708, 710 (9th Cir. 1980); *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975). Section 1362 does not mandate unfettered access by Indian tribes to a federal court any more than Section 1345, which was at issue in *Colorado River*, mandates such unfettered access by the United States. To the contrary, as this Court recognized in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 472-73 (1976), Section 1345 is even broader than Section 1362. Indeed, in rejecting the Tribes' Section 1362 argument, the district court reasoned that "[t]o hold otherwise would be to undermine the policy against piecemeal adjudication underlying the McCarran Amendment by finding that a mere subsititution of the name of one party for the other would change the result." Pet.App. in No. 81-2147 at E-9. The Tribes' argument elevates form over substance.

[9] The Tribes also complain that there cannot be a general adjudication in state court because of their alleged conflict of interest with the United States. This claim, which in no event raises a jurisdictional issue, was discussed in our opening brief. *See Petitioners Brief* in No. 81-2147 at 41-43. Moreover, this Court recognized in *Colorado River* that the "[m]ere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration. . . ." 424 U.S. at 812. Acceptance of the Tribes' argument would cast a shadow of uncertainty over every water decree in which the United States has appeared on behalf of Indians.

specially-designed state statutory procedures for the comprehensive adjudication of all conflicting water claims.

Both of these policies are furthered by the general adjudications in the Arizona state courts; neither of these policies is furthered by the disjointed, piecemeal litigation in the Arizona federal court. Both of these policies are actually frustrated by the United States' proposal for simultaneous litigation in federal court and state court over the same water.

A. *The Arizona General Adjudications Are Comprehensive And Adequate.*

There is little dispute over the comprehensiveness of Arizona's statutory procedure for the general adjudication of conflicting claims to water.[10] Under that procedure, each owner of land in the watershed under adjudication is identified and personally served with process, and each water right is determined in a decree binding on all water claimants within the watershed—which, of course, is precisely the procedure required by the McCarran

[10] The only specific defects alleged are the suggestions that the Arizona proceedings cannot encompass portions of rivers in other states or tribal claims based on aboriginal and treaty rights. This Court specifically rejected the same "interstate" argument as "almost frivolous" in *United States v. District Court In and For the County of Eagle*, 401 U.S. 520, 523 (1971). Second, the Arizona general adjudications encompass "all water subject to claims based upon federal law," A.R.S. § 45-251(4), without regard to the origin of the claims.

Amendment.[11] Admittedly, this is not a simple task.[12] Nevertheless, over 80,000 potential water claimants have already been personally served with process in the Arizona general adjudications, and thousands of claims, including 2865 on behalf of the United States,[13] have already been filed in these proceedings.

Despite their failure to seek any determination of their water claims for over 70 years following *Winters v. United States*, 207 U.S. 564 (1908), the United States and the Arizona Tribes now object that the state court general adjudications are "inadequate" because they have not proceeded quickly enough. *E.g., United States Brief* at 38. To the extent that the progress of the proceedings in state court is even at issue here, those proceedings have been persistently interrupted by (1) the Tribal filings in federal district court of removal petitions and complaints seeking to restrain any further proceedings in state court and (2) the repeated requests by the United States and the Tribes (which the state court has granted) for extensions of time

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[11] This Court has repeatedly held that the McCarran Amendment's waiver of sovereign immunity is applicable only to general adjudications of water rights in which all conflicting water claims are determined on an *inter sese* basis. *E.g., Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. District Court In and For the County of Eagle*, 401 U.S. 520 (1971); *United States v. District Court In and For Water Division No. 5*, 401 U.S. 527 (1971). The contrary argument of some of the Arizona Tribes, *see, e.g., Navajo Brief* at 16, is inconsistent with this authority and with the positions taken by the other Tribes before this Court.

[12] Nor is it an inexpensive task. To date, the Arizona Legislature has appropriated well over $2,000,000 just to cover the expense of identifying claimants and serving them with process. See 1979 Arizona Sess. Laws, Ch. 139, Sec. 82 (appropriating $600,000); 1981 Arizona Sess. Laws, Ch. 126, Sec. 2 (appropriating $1,843,700).

[13] See *United States Brief in Opposition* (filed September 1982) at 4, in *White Mountain Apache Tribe v. Smith*, No. 81-2334. A brief summary of pertinent information from the existing Arizona cases is included in the Appendix to this brief.

within which to file their water claims.[14] Petitioners submit that it is disingenuous for respondents to seek extensions of time in the state court and then to criticize that court for not having proceeded in a diligent fashion.[15]

Moreover, the record belies such assertions as "[a] prompt judicial decree is of special urgency for the Navajos and other tribes. . . ." *Navajo Brief* at 27. The truth of the matter, as reflected in the record,[16] is that the Navajos and the other Arizona Tribes only filed their complaints and removal petitions in the Arizona federal court as an immediate reaction to the service of process in January and February of 1979 on thousands of potential water claimants in the state general adjudication of the Salt Riv-

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[14] In fact, the attorney for the United States specifically represented to the state court that upon obtaining the requested extensions of time, it would not argue that the state proceedings were not moving in a diligent fashion. Jt.App. I at 194. Nor did any of the Indian tribes who were represented by counsel at the February 23, 1981, state court hearing (including respondents Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe and Payson Community of Yavapai Apache Indians)—in which a nearly one year filing extension was sought—object when the presiding judge asked, "But if there is someone here who feels, be they observers representing tribes and appearing here as observers or having appeared already, that this case is not moving fast enough to suit them or that the Federal Court can move it faster, I would, at this time, request those attorneys or others to make their views known." Jt.App. I at 194.

[15] In fact, the attorney for one tribe complaining about the progress of the state court proceedings, the Salt River Pima-Maricopa Indian Community, wrote to the presiding state court judge after the United States and the tribes has been granted a nearly one year extension of time that "[o]ur client is not presently prepared to undertake the prosecution of its water rights claims in actions pending in the Superior Court." Jt.App. I at 215.

[16] Five of the Tribal actions in the federal court were initiated on the same day, March 7, 1979. The four complaints which sought determination of an individual tribe's rights to water were filed April 13, 16, and 17, 1979. See Appendix to this brief.

er.[17] Characterization of the state proceedings as an "empty shell", "dormant", "slumbering" and "lifeless", *Navajo Brief* at 28, more accurately describes the Navajos' own federal court litigation since, as the record confirms, the Navajos have never bothered even to serve process on any of the defendants except the State of Arizona.[18] So much for their claimed "special urgency".[19]

In short, the massive filing of complaints and removal petitions by Tribes in the Arizona federal court was no mere coincidence by which the Arizona Tribes suddenly decided they needed a "prompt" determination of water claims. This "wasteful and acrimonious procedural skirmishing illustrated by the present cases", *United States Brief* at 35, cannot be permitted to subvert the comprehensive adjudication of conflicting water claims in unified state proceedings recognized in the McCarran Amendment and endorsed in *Colorado River*.

B. *The Government's Proposal For Simultaneous Adjudications Is Unjustified And Unworkable.*

The United States proposes that this Court repudiate its previous recognition in *Colorado River* "that actions seeking the allocation of water essentially involve the

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[17] For example, the San Carlos Apache Tribe was served on February 5, 1979 and filed its injunction/removal case on March 7, 1979 and its cases for declaration of water rights on April 16 and 17, 1979. See Appendix to this brief.

[18] Thus, only one defendant has been served with process in the Navajos' federal court action; by contrast, over 58,000 water claimants have personally been served with process in *In re the General Adjudication of All Rights To Use Water of the Little Colorado River System and Source*, No. 6147.

[19] Also telling is the failure of the San Carlos Apache Tribe to serve process on anyone in *San Carlos Apache Tribe v. State of Arizona, et al.*, No. CIV 79-269 PHX-CAM (D. Ariz. Complaint filed April 16, 1979), and in *San Carlos Apache Tribe v. State of Arizona, et. al.*, No. CIV 79-104 GLO-MAR (D. Ariz. Complaint filed April 17, 1979). These actions are not presently before this Court since no process was ever served, no defendants ever filed any motions, and the district court made no rulings.

disposition of property and are best conducted in unified proceedings." 424 U.S. at 819. As a compromise, the government suggests Indian tribes should be given a "reasonable time" after commencement of a state court adjudication to file complaints in federal district court for determination of the Indian claims against the same tens of thousands of parties to the state court general adjudication. *United States Brief* at 37. Once the Indian claims have been determined, so the argument goes, "the federal judgment can be incorporated in the comprehensive state court decree, which will be administered by state authorities, subject only to the power of the federal court to assure implementation of its judgment." *United States Brief* at 23.

The only justification the government offers for its proposal is the general notion that the federal courts have traditionally exercised protective jurisdiction over Indian matters. This Court expressly rejected the same argument now asserted by the government in opposition to *exercise* of state court jurisdiction, that it had earlier asserted in *Colorado River* against the *existence* of state court jurisdiction. 424 U.S. at 812.

There are four additional defects in the United States' proposal, which has neither legislative[20] nor judicial support. First, it stands in open contradiction to this Court's holding that "the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals [*i.e.*, "the avoidance of piecemeal adjudication of water rights in a river system"]." 424 U.S. at

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[20] In fact, the spokesman for the Justice Department at the McCarran Hearings expressly criticized such simultaneous adjudication:

> [W]e would in effect have two methods of adjudicating rights. We would have the situation where the Federal court was adjudicating rights, and superseding in effect the State procedure which is in existence.

Hearings on S. 18 Before The Subcommittee of the Committee on the Judiciary, United States Senate, 82nd Cong., 1st Sess. (1951) at 5.

819.[21] Though ostensibly seeking a "clearer and more generalized rule", *United States Brief* at 35, the United States actually seeks to avoid the clear holding of *Colorado River*. The government's admission that its proposal will result in "some piecemealing"[22] of water rights adjudication is directly contrary to the McCarran Amendment's preference for comprehensive adjudication of all conflicting water rights in the "elaborate procedures for allocation of water and adjudication of conflicting claims to that resource" that "several Southwestern States have established. . . ." *Colorado River*, 424 U.S. at 804.

The second fundamental defect is that the proposal cannot legally work. The United States acknowledges that, in order for everyone to be bound by any federal court judgment, it must be made an involuntary defendant, "together with all claimants on the stream."[23] *Brief* at 31. This, of course, is impossible unless the McCarran Amendment's waiver of sovereign immunity is applicable. The McCarran Amendment would not be applicable to the limited litigation in federal court proposed by the government because there would be no determination in that action of the entire

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[21] The irony of the government's proposal is that it would have this Court place its imprimatur on a procedure that is even more piecemeal than the federal court litigation in *Colorado River*, notwithstanding that "[t]he clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system". 424 U.S. at 819.

[22] Actually, to say that there will be "some piecemealing" is an understatement. In 1979, seven different tribes filed ten separate actions, and in 1982 five more tribal actions were filed. In each of these actions, all claimants in the state court adjudications would, as the government acknowledges, have to be made parties.

[23] Several pages later, however, the United States suggests an alternative, a defendant class action. Even so, it acknowledges that personal notice should probably be given. Far from creating a "bright line", the government's proposal, while apparently still in the process of development, remains vague and confusing. *United States Brief* at 33-35.

community of water claims on an *inter sese* basis.[24] To side-step this threshold problem, the United States proposes that this Court now construe McCarran as being applicable to a combination of separate actions, several in federal court and one in state court, none of which under the government's proposal would determine the entire community of conflicting water claims.[25] There is no support for such a novel construction of the McCarran Amendment. Indeed, such a construction is inconsistent with the language of the Amendment itself.[26]

The third fundamental defect is that, as a practical matter, the government's proposal would cause extraordinary duplication, with the attendant costs to parties and sheer waste of judicial resources, by requiring literally tens of thousands of water claimants to be parties to simultaneous proceedings in federal court and state court over the same water. Indeed, the government expressly recognizes "that practical difficulties—duplication, undue burdens or delays—would weigh against" its proposal. *United States Brief* at 27. We agree, and we submit that the difficulties the government overlooked—such as the millions of dollars in costs for personal service of process on tens of thousands of water claimants, the undue burden on water claimants in having to retain counsel for representation in simultaneous

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[24] See note 11, *ante*.

[25] At last count, there were nine pending tribal actions seeking some kind of discrete determination of their claims in federal courts. In addition, there are numerous tribes in Arizona which have not yet sought any determination of their rights. See Appendix to this brief.

[26] The waiver of sovereign immunity in the McCarran Amendment is limited to any "*suit* for the adjudication of rights to the use of water of a river system or other source. . . ." (Emphasis added). The United States' citation of the two *Eagle County* decisions for the proposition that the word "suit" should be expanded to mean a "class-by-class adjudication procedure divided between State and federal courts", *United States Brief* at 30-31, is unfounded. The *Eagle County* decision involved supplemental proceedings in the same suit before the same court, a point which the United States concedes: "There, to be sure, the separate proceedings contemplated were all in State court." *Id.* at 31.

federal and state court proceedings, the inevitable delays in federal court as a result of crowded dockets and lack of any specially-designed procedure for determination of water rights, and the inherent duplication of proof as to the nature of the river system under adjudication—are intolerable.[27]

The fourth fundamental defect in the government's proposal is the friction and endless jurisdictional quarrels that would arise between the state and federal courts as a result of the notion that the federal court determination of Indian water rights, even after it has been "incorporated" into the state court decree, would remain subject "to the power of the federal court to assure implementation of its judgment." *United States Brief* at 23. There is no need for creation of an entirely new judicial system in which federal district courts sit in review of state courts. Furthermore, a federal court could "implement" its determination of Indian water rights only by asserting jurisdiction over conflicting non-Indian water rights, which under the government's proposal, would not be subject to the jurisdiction of the federal court.

As a practical matter, even though a general adjudication would also place a horrendous burden on the federal district courts that would be preferable to the unworkable duplicative proposal of the government.

C. *The Proposed Defendant Class Action Is Unworkable.*

The Arizona Tribes propose an even more piecemeal alternative. Their proposed "defendant class action" is admittedly not a general stream adjudication. For that reason, McCarran's waiver of sovereign immunity is inapplicable, which would preclude the determination of the United States' claims as well as conflicting claims

[27] The reference by the United States and the Navajo Tribe to the state court proceedings in Wyoming as an example where Indian water rights can be determined without "duplication" is highly misleading since all claimants were before the same court in the same action.

among the various tribes in the same watershed. "As a result, an adjudication of the rights of the plaintiff tribes would accomplish nothing since it could have no binding effect on the absent claimants." Pet. App. in No. 81-2147 at A-13 (Merrill, J., dissenting). The Arizona Tribes are simply unable to respond to this fundamental defect in their proposal.

Moreover, there is no authority for a "defendant class action" to adjudicate conflicting water rights. Indeed, the federal district court in Arizona has already rejected efforts to determine water rights on some of the very watersheds under adjudication in these appeals without the joinder of all claimants. *Hurley v. Abbott*, 259 F.Supp. 669, 670 (D. Ariz. 1966) ("Due to the *inter sese* nature of appropriative rights ... [claimants] ... are not a class, and all must be made a party to the suit.").

The only authority cited by the Tribes—*United States v. Truckee-Carson Irrigation District*, 71 F.R.D. 10 (D. Nev. 1975)—actually illustrates the impropriety of their scheme. Although the district court permitted an irrigation district to represent its own members since no "certificate holder could or would be in a position to establish in himself a superior right to water from that common source of supply or against any other certificate holder," *id.* at 15, the individual joinder of the approximately 13,000 water claimants who were *not* members of the irrigation district was required because "[e]ach individual defendant has a water right with a priority date which could be applied to defeat another's right which is junior." *Id.*

The Arizona Tribes' assertion of a "common interest" among conflicting water claimants is invalid[28] because " 'a court cannot simply assume' a class representative is adequate." *Brief for Montana Respondent Bowen* at 25. As a result, "the class decree may be set aside on collateral attack [citation omitted], depriving the ... decrees of any reliable finality, which defeats the prime objective in comprehensive stream adjudications." *Id.* at 26. Thus, the proposal of the Arizona Tribes is irreconcilable with the overriding objective of comprehensive adjudication[29] under the McCarran Amendment.

In summary, the Arizona state court adjudications, involving tens of thousands of personally-served defendants, thousands of claims already filed (including over 2,000 by the United States), millions of dollars in expenditures and a specially-designed statutory mechanism are legitimate pro-

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[28] For example, a water user downstream from an Indian tribe will not stand in the same shoes as an upstream user with a high consumptive use because a *larger* Indian water right for a lower consumptive use, such as irrigation or instream use, would increase the amount of water for the downstream claimant. There is no merit to the suggestion that the State of Arizona, which itself is a water claimant, can represent all others with conflicting claims as *parens patriae*. There is no "common interest," and the proprietary claims of the state conflict with its alleged quasi-sovereign role as a *parens patriae*. *Snapp v. Puerto Rico*, ____ U.S. ____ (1982); *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 259-61 (1972).

[29] There is no merit to the suggestion that a federal court determination will be binding against absent water claimants as a result of A.R.S. § 45-257(B)(1), which requires a state court to "accept" determinations of water rights in prior decrees. Rather, as is true of western water rights adjudications generally, this statute requires the state court to "accept" determinations of water rights in prior decrees as *prima facie* evidence, which can be rebutted by evidence adduced by persons who were not parties to the prior decree. *E.g., Laramie Irrigation and Power Co. v. Grant*, 44 Wyo. 392, 12 P.2d 235 (1932); *Campbell v. Wyoming Development Co.*, 55 Wyo. 347, 102 P.2d 745, 750-51 (1940); *Wills v. Morris*, 100 Mont. 514, 50 P.2d 862, 866 (1935); *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 45 Pac. 444 (1896), *cert. denied*, 166 U.S. 719 (1897).

ceedings for determination of all water claims in Arizona, including those owned by the United States for the many Indian tribes. Given the limited relief sought by the several tribal actions in federal district court and the incipient status of those cases, the district court judge's deference to the Arizona state court proceedings was fully justified under the principles this Court applied in *Colorado River*.

CONCLUSION

The Ninth Circuit decisions should be reversed in favor of the rulings of the Arizona district court.

ROBERT K. CORBIN
The Attorney General
RUSSELL A. KOLSRUD
1275 West Washington
Phoenix, Arizona 85007
Assistant Attorney General
Attorneys for Petitioners
State of Arizona and
Arizona State Land
Department

BILL STEPHENS
STEPHENS AND TOLES
1010 East Jefferson
Phoenix, Arizona 85034
Attorneys for Petitioners
City of Phoenix and City
of Prescott, Arizona

JON L. KYL (Counsel of
Record)
M. BYRON LEWIS
JOHN B. WELDON, JR.
JENNINGS, STROUSS &
SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Petitioners
Salt River Valley Water
Users' Association and
Salt River Project
Agricultural Improvement
and Power District

ALVIN H. SHRAGO
EVANS, KITCHEL &
JENCKES, P.C.
2600 N. Central Avenue
Phoenix, Arizona 85004
Attorneys for Petitioners
Phelps Dodge Corporation
and Phelps Dodge
Industries, Inc.

APPENDIX

PROCEEDINGS IN ARIZONA STATE COURTS:

1. *In re the General Adjudication of All Rights to Use Water in the Salt River System and Source.*

Filed: April 26, 1974

Number of potential claimants served: 11,936

Claims filed prior to stay of proceedings: 4,725

Claims filed by the United States prior to stay: 2,315

United States was served on its own behalf and for all of the respondent Indian Tribes.

2. *In re the General Adjudication of All Rights to Use Water in the Verde River System and Source.*

Filed: February 25, 1976

Number of potential claimants identified: approx. 57,000

Number of potential claimants served: none; the Arizona Department of Water Resources is ready to serve by certified mail, pending outcome of this case.

Claims filed prior to stay proceedings: none

Claims filed by the United States prior to stay: none

United States is a potential claimant on its own behalf and for the respondent Indian Tribes.

3. *In re the General Adjudication of All Rights to Use Water in the San Pedro River System and Source.*

Filed: February 17, 1978

Number of potential claimants served: approx. 12,000

Claims filed prior to stay of proceedings: approx. 6,167 (1 claim filed by the Gila River Indian Community).

Claims filed by the United States prior to stay: 550

4. *In re the General Adjudication of All Rights to Use of Water in the Gila River System and Source.*

Filed: February 17, 1978

Number of potential claimants identified: none

Claims filed prior to stay of proceedings: none

Claims filed by the United States prior to stay: none

United States is a potential claimant on its own behalf and for the respondent Indian Tribes.

5. *In re the General Adjudication of All Rights to Use of Water of the Little Colorado River System and Source.*

Filed: February 17, 1978

Number of potential claimants served: 58,500

Claims filed prior to stay of proceedings: approx. 1,500

Claims filed by the United States prior to stay: none

United States was served on its own behalf and for the respondent Indian Tribes.

PROCEEDINGS IN FEDERAL DISTRICT COURT:

1. *Adjudication of conflicting rights to the use of water from the Salt River above Granite Reef Dam and its tributaries including Tonto Creek, excluding the Verde River and its tributaries.*

Removal Petition of the White Mountain Apache Tribe.

Filed: March 7, 1979.

Number: CIV 79-182 PHX WPC

Number of persons or entities served: no record of service, but the State of Arizona and Salt River Valley Water Users' Association appeared.

Federal Court proceedings: case remanded to state court.

2. *Adjudication of conflicting rights to use of water from the Salt River above Granite Reef Dam and its tributaries including Tonto Creek, excluding the Verde River and its tributaries.*

Removal Petition of the Gila River Indian Community.

Filed: March 7, 1979

Number: CIV 79-183 PHX VAC

Number of persons or entities served: no record of service, but the State of Arizona and the Salt River Valley Water Users' Association appeared.

Federal Court proceedings: case remanded to state court.

3. *Adjudication of conflicting rights to the use of water from the Salt River above Granite Reef Dam and its tributaries including Tonto Creek, excluding the Verde River and its tributaries.*

Removal Petition of Salt River Pima-Maricopa Indian Community.

Filed: March 7, 1979

Number: CIV 79-184 PHX VAC

Number of persons or entities served: 3 (Salt River Valley Water Users' Association, State of Arizona, State of Arizona Land Department).

Federal Court proceedings: case remanded to state court.

4. *Salt River Pima-Maricopa Indian Community v. State of Arizona.*

Complaint for Declaratory Judgment and Permanent Injunction staying state court adjudication proceedings as to the Community.

Filed: March 7, 1979

Number: CIV 79-185 PHX VAC

Number of persons or entities served: 2 (State of Arizona and State of Arizona Land Department) Salt River Valley Water Users' Association intervened.

Federal Court proceedings: complaint dismissed.

5. *San Carlos Apache Tribe of Arizona v. State of Arizona.*

Complaint for Declaratory Judgment and Permanent Injunction staying state court adjudication proceedings as to the Tribe.

Filed: March 7, 1979

Number: CIV 79-186 PHX VAC

Number of persons or entities served: 4 of 4 defendants (State of Arizona, State of Arizona Land Department, John M. Little, Salt River Valley Water Users' Association).

Federal Court proceedings: complaint dismissed.

6. *Payson Community of Yavapai-Apache Indians v. State of Arizona.*

Complaint for Declaratory Judgment and Permanent Injunction staying state court adjudication proceedings as to the Tribe.

Filed: March 7, 1979

Number: CIV 79-187 PCT VAC

Numbers of persons or entitites served: 4 of 4 defendants (State of Arizona, State of Arizona Land Department, John M. Little, Salt River Valley Water Users' Association).

Federal Court proceedings: complaint dismissed.

7. *Fort McDowell Mohave-Apache Indian Community v. Salt River Valley Water Users' Association.*

Complaint seeking declaration of Community's rights to the use of waters from the Verde River and its tributaries, plus damages.

Filed: April 13, 1979

Number: CIV 79-267 PHX VAC

Number of persons or entities served: 13 of 14 defendants (14th named defendant appeared despite lack of service).

Federal Court proceedings: complaint dismissed.

8. *San Carlos Apache Tribe of Arizona v. State of Arizona.*

Complaint for declaration of Tribe's rights to water from Salt River.

Filed: April 16, 1979

Number: CIV 79-269 PHX CAM

Number of persons or entities served: 0 of approx. 47 named defendants plus thousands of fictitiously named defendants.

Federal Court proceedings: none; case still pending.

9. *San Carlos Apache Tribe of Arizona v. State of Arizona.*

Complaint for declaration of Tribe's rights to water from upstream tributaries to Gila River.

Filed: April 17, 1979

Number: CIV 79-104 GLO MAR

Number of persons or entities served: 0 of 33 named defendants and thousands of fictitiously named defendants.

Federal Court proceedings: none; case still pending.

10. *Navajo Nation v. United States of America.*

Complaint for Declaratory Relief with respect to Tribe's rights to stream, surface and ground waters of the Little Colorado River Basin.

Filed: April 17, 1979

Number: CIV 79-276 PCT VAC

Number of persons or entities served: 1 of 8 named defendants. (State of Arizona served; United States of America appeared despite lack of service).

Federal Court proceedings: Suit stayed pending determination of rights of Navajo Tribe in state court adjudication proceedings.

11. *Salt River Pima-Maricopa Indian Community v. United States of America.*

Action for Declaratory Judgment of Tribe's rights to water from the Salt River and for review by the Secretary of Interior of federal contracts.

Filed: January 18, 1982

Number: CIV 82-745 PHX CLH

Number of persons or entities served: 17 of 17 named defendants.

Federal Court proceedings: Case was transferred from District of Columbia District Court to Arizona Federal District Court; decision on motion to dismiss or for a stay pending.

12. *Salt River Pima-Maricopa Indian Community v. Aguilar.*

Complaint for damages due to pumping of ground water.

Filed: December 27, 1982

Number: CIV 82-2162 PHX VAC

Number of persons or entities served: 203 of approx. 226 defendants named, as of February 8, 1983.

Federal Court proceedings: none

13. *United States of America on behalf of the Salt River Indian Community v. City of Phoenix.*

Action for Declaratory Judgment of Tribe's rights and Damages.

Filed: December 29, 1982

Number: CIV 82-2173 PHX WPC

Number of persons or entities served: 0 of approx. 171 named defendants.

Federal Court proceedings: none

14. *United States of America on behalf of Gila River Indian Community v. Roosevelt Water Conservation District.*

Action for Declaratory Judgment of Tribe's water rights and Damages.

Filed: December 29, 1982

Number: CIV 82-2174 PHX CLH

Number of persons or entities served: 0 of approx. 337 named defendants.

Federal Court proceedings: none

15. *Gila River Indian Community v. Gila Valley Irrigation District.*

Action for accounting by defendants for water used by them and for alleged income and profits from such use, and for an injunction to stop the use of water in conflict with the Tribe's rights.

Filed: December 30, 1982

Number: CIV 82-2185 PHX CAM

Number of persons or entities served: 0 of approx. 17,000 named defendants plus thousands of fictitiously named defendants.

Federal Court proceedings: none

In cases 1 through 15, no Indian Tribes have been joined as defendants.

The data presented in this appendix is all of record in the State and federal proceedings.